Petition

81-1680

No._____

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ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROY G. ANDERSEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the Motion for Judgment of Acquittal at the conclusion of the Government's case should not have been granted and/or the jury verdict should not have been reversed because the Government failed to present the jury with the testimony of an expert?

2. Whether or not the trial court failed to properly instruct the jury in this complex case involving an exchange under Title 26, United States Code, Section 1031?

3. Whether or not the trial court in light of decisions of this Court should have granted a motion for Judgment of Acquittal at the conclusion of the case or in the alternative the Court of Appeals for the Ninth Circuit reversed the conviction because as a matter of fact and/or law the Petitioner could not form the required specific intent?

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROY G. ANDERSEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, ROY G. ANDERSEN, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 4, 1981, and as to which a Petition for Rehearing and Suggestion for Hearing En Banc was denied on February 23, 1982.

OPINION BELOW

On December 4, 1981, the United States Court of Appeals, Ninth Circuit, filed an opinion affirming the judgment of conviction entered in the District Court for the Southern District of California. A copy of the opinion is attached hereto as Appendix "A".

A timely Petition for Rehearing and Suggesting for Hearing En Banc was filed on December 17, 1981. By order dated February 23, 1982, the Petition for Rehearing and Suggestion for Hearing En Banc was denied. A copy of that order is attached hereto as Appendix "B".

JURISDICTION

The Court of Appeals affirmed a judgment of conviction of petitioner for violations of Title 26, United States Code, Section 7206(1) and has denied a petition for Rehearing and Suggestion for Hearing En Banc. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

This case involves a determination of whether or not the Petitioner could form the requisite specific intent under Title 26, United States Code, Section 1031 in light of the decision of this Court in *United States v. Bishop*, 412 U.S. 346 (1973), and *James v. United States*, 366 U.S. 213 (1961).

The Petitioner in this case was involved in many complex real estate transactions in the late 1960's and early 1970's.

In substance the Petitioner attempted to defer income and avoid taxes by utilizing the complex provisions of Title 26, United States Code, Section 1031. It was and is the contention of the Government that the Petitioner on three occasions violated Title 26, United States Code, Section 7206(1).

On the first occasion the Petitioner on April 13, 1974, filed an individual tax return for the calendar year 1973. This allegation concerns a complex set of facts relating to the sale of the Ice House and five other real estate transactions which occurred in 1973.

On the second occasion the Petitioner on April 13, 1975, filed an individual tax return for the calendar year 1974. This allegation concerns another complex set of facts relating to the failure of the Petitioner to report interest income received, the statement by the Petitioner on form 4683 that he had no financial interest in a foreign bank account, and failed to report receipts from the sale of a 25% interest in a joint venture involving real estate.

On the third occasion the Petitioner on April 28, 1974, filed a partnership return for the Andersen Company for the fiscal year ending February 28, 1974. This allegation again involves a complex set of facts relating to the Ice House and real estate in the State of Washington being exchanged for real estate in San Diego, California.

In light of the rule of *Glasser v. United States*, 315 U.S. 60 (1942) that the evidence must be viewed in the light most favorable to the Government, Petitioner would normally not be appealing on the basis of sufficiency of the evidence.

However in this unique case which involved the 71 year old Petitioner who is not a tax expert handling complex 1031 exchanges which relate to all of the transactions referred above it is contended that the evidence was insufficient in three particular areas. First the Government did not utilize an expert in this case, second the trial court improperly instructed the jury on an "exchange" under Title 26, United States Code, Section 1031 and finally the record does not support finding by the jury that the Petitioner had the requisite specific intent to violate Section 7206(1).

The facts relating to the issues raised by the Petitioner will be set forth as to each issue separately in the Argument section of this Petition.

REASONS FOR GRANTING THE WRIT

Introduction

The three arguments presented to this Court for consideration are interrelated in that the main issue involves the complexity of an "exchange" under Title 26, United States Code, Section 1031 and whether or not the Petitioner was afforded due process of law in his conviction for violations of Title 26, United States Code, Section 7206(1) as it relates to his attempt to utilize Section 1031, *supra*.

1. The Motion for Judgment of Acquittal at the conclusion of the Government's case should have been granted and/or the jury verdict should have been reversed because the Government failed to present the jury with the testimony of an expert.

No expert testified for the Government. Though the *present* state of the law would seem to indicate that the Government need not present the

testimony of an expert it is respectfully suggested that in this unique[1] and complex case such evidence was required.

In this case the witnesses for the Government testified that exchanges were common, that exchanges can be consummated at a later date, that the use of straws or nominees was common, that Petitioner always intended exchanges, money may be held in escrow or trust for a number of years and it is a common practice, the utilization of multiple parties, nominees (straw), the passage of time and the receipt of cash is common and money in an exchange may be placed in limbo until the exchange is completed.

This testimony was contrary to the position taken by the Government, say nothing of the jury instructions which will be discussed *infra*. It would seem only logical that in this unique case with a complex set of facts and a complex and unsettled statute that the Government should have been required to present expert testimony regarding Title 26, United States Code, Section 1031.

In light of the foregoing it is respectfully suggested that this Court should require an expert in this unique and complex case.

It is respectfully suggeted that notwithstanding the present state of the law that the Government must present an expert witness in order that the jury *may* have some basic guidelines regarding a statute such as Section 1031, *supra*. This failure allows a jury to reach a determination without proper guidelines and violates due process of law.

2. The trial court failed to properly instruct the jury in this complex case involving an exchange under Title 26, United States Code, Section 1031.

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[1] No other criminal case alleging a violation of Title 26, United States Code, Section 7206(1) and Title 26, United States Code, Section 1031 has been found.

As to Section 1031 the trial court instructed the jury as follows:

> "You have heard testimony concerning the defendant's knowledge of Title 26, United States Code, Section 1031, a section of the Internal Revenue Code which provides that certain property exchanges can be made tax free. Section 1031 provided as follows:
>
> > 'No gain or loss shall be recognized if the property held for productive use in trade or business or for investment is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.'
>
> The law requires that there be an exchange of like kind property. It is obvious that money is not like kind property, and Section 1031 so provides.
>
> In property transferred solely for money, the transaction is a sale, not an exchange, no matter what the seller does with the money he receives. Where property is sold, a seller must report on his tax return for the year of the sale his sales receipts, his basis in the property, his expenses attributable to the sale, and his necessary profit or loss on that sale.
>
> Section 1031 provides that no gain or loss shall be recognized if the property held for investment, or used in trade or business, is exchanged solely for property of like kind, as I have indicated. Under this provision of the Internal Revenue Code, an individual recognizes no taxable gain or loss in the year of the exchanges, and accordingly, is not required to report any gain or loss from such an exchange on his income tax return for that year.
>
> Section 1031 does not require that the exchange of property take place simultaneously. The law does not

provide a time limit within which an exchange must be completed.

For example, a taxpayer may deed his investment property to an independent intermediary. The intermediary may then sell the property and hold the sales proceeds until a suitable exchange property can be found, at which time the intermediary may purchase that property and transfer it to the taxpayer to complete the exchange. If the taxpayer receives an exchange for his investment property, nothing but like kind property which he holds for investment, he will not be taxed on the exchange. On the other hand, whenever a taxpayer receives cash or something other than like kind property, he must report the transaction on his next return for the year in which the transaction occurred.

A delayed tax free exchange -- in delayed tax free exchanges, while the intermediary is holding the sales proceeds interest may accrue on the money he is holding, such interest is not excludable in the taxable income of the taxpayer until the year in which he receives it."

These jury instructions will be analyzed in two sections. First the failure to give the jury instructions in form or in substance which had been requested by the Petitioner and second those jury instructions that should have been given by the trial court as a matter of law.

Instructions Refused

The trial court refused to give Petitioner's jury instruction number 1. This instruction related to the interest earned on money which was being held in a Bermuda bank account by the Petitioner as a trustee in order to complete a Section 1031 exchange. The interest is clearly not taxable until received by the Petitioner. This position is supported by the case of *Starker v. United States*, 602 F.2d 1341 (9th Cir. 1979), which held that interest is not taxable until actually received.

The failure to give this instruction was reversible error in that the trial court did not present to the jury a tenable legal theory based upon the evidence and the applicable law.

The trial court failed to instruct the jury on the intent of the Petitioner to conclude a Section 1031 exchange. The Petitioner's intent is a crucial factor which is accorded great weight even in civil cases. *Starker v. United States, supra*; *Alderson v. C.I.R.*, 317 F.2d 790 (9th Cir. 1963); *Biggs v. C.I.R.*, 632 F.2d 1171 (5th Cir. 1980). These instructions were offered by the Petitioner in defendant's instruction number 2 (page 1 lines 24-32), and defendant's instruction number 4 (page 1 line 32, page 2 lines 1-2). The failure to give these instructions is reversible error.

The jury instructions given by the trial court at pages 1502 and 1503 of the Reporter's Transcript are misleading in that they suggest to the jury that the eventual receipt of cash will render the taxpayer *criminally* liable in all cases for having initially adopted exchange treatment on his returns while the transaction was still open. This is an incorrect statement of the law which was compounded by the failure of the trial court to give defendant's jury instruction number 2 (page 1 lines 24-32) with proper explanations regarding timing and reporting requirements.

The failure of the trial court to give defendant's instruction number 3 in its entirety and defendant's instruction number 4 (page 1, lines 27-31) was reversible error. As indicated in Section number 3 of the Reasons for Granting the Writ, *infra*, there is a great deal of dispute and question as to the law in distinguishing between "qualifying 1031 exchanges" on the one hand and "sales" on the other. Case law has been liberal in favor of the taxpayer in allowing exchange treatment. Most recently 1031 treatment has been afforded even though there have been technical defects. Mechanical tests and formalisms are no longer a basis for determination. *Starker v. United States*, 602 F.2d 1341 (9th Cir. 1979).

The trial court committed reversible error in failing to give defendant's jury instructions number 2 (page 1 lines 24-32), number 3, and number 4

(page 1 lines 27-31 and page 2 lines 1-9). These instructions should have been given in light of *Carlson v. United States*, 385 F.2d 238 (5th Cir. 1967). There the taxpayer received cash and for that reason the court held that Section 1031 did not apply. Nevertheless the case was very close, and the court commented that the transaction "almost" qualified. Even if the Petitioner received cash that is not dispositive in a criminal case. The cash received arguably was a constructive receipt and thus the jury instructions requested should have been given by the trial court.

Jury Instructions Not Given.

Even though jury instructions were not requested by counsel for the Petitioner the trial court may be reversed if the failure to instruct was plain error. *United States v. James*, 576 F.2d 223 (9th cir. 1978). Simply stated there were jury instructions in this case that the trial court should have given *sua sponte* and for that reason the case should be reversed when those instructions are considered alone or in their totality.

In approaching this analysis we will present the specific areas of testimony which should have given rise to jury instructions by the trial court.

There was testimony regarding the import of the timing relating to the execution of a real estate transaction versus the recording of a real estate transaction. This was argued to the jury and no jury instruction was given by the trial court.

There was testimony concerning a deferred tax exchange receivable. No instruction was given by the trial court. There was testimony concerning tax losses the Petitioner did not take in light of his attempt to affect a 1031 exchange. No instruction was given by the trial court.

There was testimony that the receipt of cash on an open 1031 exchange agreement is not taxable and is not a sale. No instruction was given by the trial court.

There was testimony that case may be held in limbo pending an exchange. No instruction was given by the trial court.

Mr. Thomas Brady, a Certified Public Accountant, testified as an expert for the Petitioner. He testified as follows: (1) you can take back an exchange receivable and can receive cash, (2) as long as you start with property and end up with property within a five year period of time you have a valid 1031 exchange, (3) nothing unusual about a straw (nominee) being involved in a 1031 exchange and holding title, (4) it is possible to accomplish an exchange without all of the parties being aware of it, (5) all of the transactions were analyzed and but for a technical flaw they were all proper exchanges, and (6) a tax free exchange need not be reported on your tax return. No instructions other than the normal expert jury instructions were given by the trial court.

For the foregoing reasons it is respectfully suggested that the trial court failed to properly instruct the jury and this case should be reversed.

The Court of Appeals for the Ninth Circuit concluded that "Appellant has neither specified the content of instructions that should have been given, nor shown how he was prejudiced by their omission." *Memorandum Opinion*, p. 4. This conclusion is contrary to the foregoing analysis.

This conclusion also seems to suggest that the Petitioner should have presented the Court of Appeals for the Ninth Circuit with the "specific content" of the instructions that should have been given by the trial court. A careful reading of the prior analysis clearly indicates not only the "content" of the instructions that should have been given but shows the prejudice that resulted in the omission by the trial court.

3. The trial court in light of the decision of this Court should have granted a Motion for Judgment of Acquittal at the conclusion of the case or in the alternative the Court of Appeals for the Ninth Circuit reversed the conviction because as a matter of fact and/or law the Petitioner could not form the required specific intent.

The Petitioner incorporates by reference his prior analysis concerning the testimony of an expert and the jury instructions.

Sufficiency of the Evidence

The Government was required to prove beyond a reasonable doubt the specific intent of the Petitioner to violate the law. This was defined by the trial court as:

> "The work 'willful' as used in this statute, means deliberately and with knowledge. An act is done willfully if done voluntarily and intentionally, and with the specific intent that the law forbids, or with specific intent to omit to do something the law requires to be done, that is, to disobey or disregard the law.
>
> Specific intent, in this instance, means more than a mere general intention to perform an act in violation of the law. Specific intent is not to be presumed merely from the filing of an incorrect tax return. It means that omissions and false statements on the returns must have been done willfully and knowingly.
>
> A person who willfully and knowingly either does an act which the law forbids, or fails to do an act which the law requires to be done, deliberately intending to violate the law, acts with specific intent.
>
> An act is done knowingly if done voluntarily and purposely and not because of mistake or inadvertence or other innocent reason.
>
> The word 'knowingly' means that state of mind wherein the defendant was in possession of facts from which he knew or was aware that he could not lawfully act or commit the acts whereof he now stands charged." (R.T. 1500-1501)[2]

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[2] "R.T." refers to Reporter's Transcript.

It is the position of the Petitioner that the Government failed to prove the specific intent required as a matter of law.

As previously indicated the actions of the Petitioner within the framework of those witnesses who testified for the Government was entirely proper.

Here the record is replete with testimony from witnesses for the Government that the Petitioner was attempting to defer income and avoid income tax by affecting a 1031 exchange.

The testimony of the Government showed that the Petitioner intended to effectuate the 1031 exchange by acting as a trustee in terms of money received. [R.T. 112-113, 125-217] There was no concealment of these transactions on the tax returns of the Petitioner. [R.T. 127, 215, 221, 483-485, 1043-1044]

In fact the Petitioner on one occasion caused a letter to be written to the Internal Revenue Service by his banker in order to attempt to resolve an interest problem. [R.T. 175, 511-512]

The testimony of a Government witness indicated that at worst the Petitioner, who was 71 years of age, attempted to handle complex transactions in a 1031 exchange without the assistance of a Certified Public Accountant or a tax attorney though he was an extremely successful businessman he was not a tax expert - say nothing of a tax expert in a confusing and unsettled area of the law.

Almost all of the Government witnesses who dealt with the Petitioner testify as to his excellent reputation for truth, honesty and veracity. [R.T. 176, 192-193, 221, 238, 249, 264, 275, 327, 491-496, 543]

When the Government's case is analyzed at its conclusion it is respectfully suggested, that even when the evidence was viewed in the light most favorable to the Government, the Motion for Judgment of Acquittal

under Rule 29 should have been granted because of a lack of evidence showing the required specific intent.

However when we analyze the case further we see that in this unsettled area of the law the only expert who testified, Mr. Thomas Brady, C.P.A., could find nothing improper with the handling of these matters other than technical flaws which could have been corrected. [R.T. 1161-1178]

As the only expert who testified in this case Mr. Brady indicated that it was entirely proper to take back an exchange receivable and to receive cash. [R.T. 1147-1148] He further testified that a 1031 exchange is proper if you start with property and end up with property within a five year period of time. [R.T. 1148, 1149, 1158] Mr. Brady further testified that there is nothing unusual about using a straw (nominee) in a 1031 exchange. [R.T. 1153-1154] He also testified that it was possible to effectuate a 1031 exchange without all of the parties being aware of the exchange. [R.T. 1169]

The testimony of Mr. Brady clearly explained and exonerated the activity of the Petitioner in this case. It is testimony which was not refuted and clearly indicated that the Petitioner did not have the requisite specific intent.[3]

How then did the jury in a few hours of deliberation reach the conclusion that the Petitioner did possess the requisite specific intent. The documents in this case could not be reviewed in a cursory fashion during the brief period of deliberations. The only logical explanation is that the trial jury may have been improperly influenced by the fact that the Petitioner did not pay any tax during the years involved [R.T. 894, 909], and because of the magnitude of the transactions in this case concluded that an individual who attempts to defer income is in effect cheating the Government.

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[3] In fact the record indicates that the Petitioner in light of his attempt to affect a 1031 exchange did not report substantial losses to which he was entitled. [R.T. 835, 888, 977, 1056, 1257, 1263]

There is a further basis for concluding that the Petitioner did not possess the requisite specific intent - the confusion in the applicable tax law.

Confusion of the Tax Law.

In *United States v. Bishop*, 412 U.S. 346 (1973) the Supreme Court of the United States as to a violation of Title 26, United States Code, Section 7206 stated as follows:

> "The Court, in fact has recognized that the work 'wilfully' in these statutes generally connotes a voluntary, intentional violation of a *known legal duty*." p. 360 [Emphasis added][4]

It is the contention of the Petitioner that the underlying question of tax law - 1031 exchange - was the subject of sufficient dispute and it was impossible for him to know precisely what his legal duty was and thus possess the requisite specific intent. Put another way the Petitioner could not in this case know his legal duty because of the substantial dispute as to the application of a 1031 exchange.

This analysis was first suggested in *James v. United States*, 366 U.S. 213 (1961) as to the treatment of embezzlement income.[5] This Court stated that:

> "But, we are dealing here with a felony conviction under statutes which apply to any person who 'willfully' fails to account for his tax or who 'willfully' attempts to evade his obligation. In *Spies v. United States*, 317 U.S. 492, 499, the Court said that § 145(b) of the 1939 Code embodies 'the gravest of offenses against the revenues,' and stated that willfulness must therefore include an evil

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[4] See also: *United States v. Pomponis*, 429 U.S. 10 (1976).

[5] See also: *Wilcox v. Commissioner*, 327 U.S. 404 (1946) and *Rutkin v. Commissioner*, 343 U.S. 130 (1952).

> motive and want of justification in view of all the circumstances. Wilfulness 'involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement.'
>
> We believe that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed. Therefore, we feel that petitioner's conviction may not stand and that the indictment against him must be dismissed." pp. 221-222 [Citations omitted]

This Court held that since the question of tax liability had been so unsettled that it was impossible for there to have been a willful violation. There could not be a violation of a *known* legal duty.

Additionally the proof must show according to *James v. United States, supra*, an evil motive and want of justification in light of all of the circumstances in order to have the requisite specific intent. That was just not present as to the Petitioner in this case. He may have deferred income and avoided income tax now but sooner or later the deferred income as a result of the attempt to utilize a 1031 exchange would become taxable income and income tax, probably in a larger amount, would have been paid to the United States.

The doctrine of *James v. United States, supra*, was recognized and applied by the Fourth Circuit in *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974). Critzer was a Cherokee Indian who had been convicted under Section 7201 for failing to report income from the lease of properties located on an Indian reservation. The Department of Interior had taken the position that the rental income was not taxable. The Fourth Circuit reversed the conviction without reaching the underlying question of whether or not the income was in fact taxable. Instead, the court concluded that the uncertainty in the law presented Critzer from

acting willfully:

> "As a matter of law, defendant cannot be guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain that even coordinate branches of the United States Government plausibly reach directly opposing conclusions. As a matter of law, the requisite intent to evade and defeat income taxes is missing. The obligation to pay is so problematical that defendant's actual intent is irrelevant. Even if she had consulted the law and sought to guide herself accordingly, she could have had no certainty as to what the law required.
>
> It is settled that when the law is vague or highly debatable, a defendant - actually or imputedly - lacks the requisite intent to violate it." p. 1162

These principles were again applied by the Fifth Circuit in *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979). In *United States v. Garber, supra*, the defendant was indicted for tax evasion for failure to report fees received as a blood donor. The Fifth Circuit, *en banc*, reversed the conviction, holding that the novelty of the question of the taxability of blood donor fees was a material factor in demonstrating lack of willfulness.

We must determine whether or not the law applicable to a 1031 exchange was vague or highly debatable and thus the Petitioner lacked the requisite specific intent.

The record is clear that Mr. Tom Brady testified that if property is ultimately exchanged for property then it is a valid 1031 exchange. [R.T. 1148, 1149, 1159] Mr. Brady also testified that the rulings and law relating to a 1031 exchange were in a state of flux. The Government has withdrawn prior rulings and has refused to issue rulings as to 1031 exchanges. He further stated that there has been a lack of direction by the Government in the area of 1031 exchanges. [R.T. 1147, 1148]

Thus the testimony of the only expert who testified in this case clearly indicated that not only was the law applicable to a 1031 exchange vague or highly debatable but that the Government by its own actions on withdrawing rulings and refusing to rule indicates that the law is vague or highly debatable.

A close scrutiny of four decisions by an attorney, and not a layman such as the Petitioner, will aid this Court in reaching the determination that an interpretation of the law as to a 1031 exchange is vague or highly debatable and thus the Petitioner could not possess the requisite specific intent.

Starker v. United States, 602 F.2d 1341 (9th Cir. 1979) was a civil case decided by this Court. It involved facts relating to a purported 1031 exchange which occurred between 1967 and 1969. The Government took the position that the taxpayer had not affected a valid 1031 exchange and was liable for capital gains tax and had ordinary income as a result of a growth factor.

As to one of the properties involved this Court held that nonrecognition must be given under 1031 because it had not been held for investment because the taxpayer had resided in the home on the property. *Id.* at 1350-1351.

Additionally where property has been transferred to a daughter as distinguished from a spouse the taxpayer can not come within 1031. *Id.* at 1351.

As to another piece of property subject to a life estate in a third party and other contingencies it was held that the taxpayer did receive a fee interest for the purpose of Section 1031. *Id.* at 1351, 1352.

The court then faced the issue of whether or not a 1031 exchange had to be simultaneous. In that regard the Court analyzed the underlying

purpose of Section 1031 and the long line of cases liberally construing Section 1031.[6] *Id.* at 1352.

The Court then analyzed the receipt of cash and the time gap in the exchange. *Id.* at 1353-1355. In substance the Court took the unique facts in that case and as it related to cash and the passage of time prior to the exchange in concluding that there had been a proper 1031 exchange.

The Court stated:

> "The metaphysical discussion in the briefs and authorities about whether the 'steps' of the transactions should be 'collapsed', and the truism that 'substance' should prevail over 'form', are not helpful to the resolution of this case. At best, these words describe results, not reasons. A proper decision can be reached only by considering the purposes of the statute and analyzing its application to particular facts under existing precedent. Here, the statute's purposes are somewhat cloudy, and the precedents are not easy to reconcile." *Id.* at 1355.

At this point in the analysis it should be emphasized that the Court in a civil case has stated that the underlying purpose of Section 1031 should be liberally construed in favor of the taxpayer because of the Court's permissive attitude and by applying Section 1031 to the facts in a given case. This analysis by the Court would lead to the conclusion that the law as to Section 1031 is vague and highly debatable and thus the Petitioner could not possess the requisite specific intent.[7]

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[6] This Court in analyzing section 1031 stated that the . . . "'underlying purpose' of section 1031 *is not entirely clear*. . . ." and that . . . "In addition to the *elusive purpose* of the section, there is a second sound reason to question the applicability of Treas. Regs. Section 1.1002-1: the long line of cases *liberally construing* section 1031. If the regulation purports to read into section 1031 *a complex web of formal and substantive requirements, precedent indicates decisively that the regulation has been rejected. Id.* at 1352. [Emphasis added]

[7] The growth factor was handled by the Court as disguised interest but only taxable when the interest was received. *Id.* at 1356.

Not only did the Petitioner lack the requisite specific intent but his activity in these transactions is best described in *Redwing Carriers, Inc. v. Tomlinson*, 399 F.2d 652 (5th Cir. 1968) as follows:

> "[A]n integrated transaction may not be separated into its components for the purposes of taxation by either the Internal Revenue Service or the taxpayer. In determining the incidence of taxation, we must look through form and search out the substance of a transaction . . . . This basic concept of tax law is particularly pertinent to cases involving a series of transactions designed and executed as parts of a unitary plan to achieve an intended result. Such plans will be viewed as a whole regardless of whether the effect of so doing is imposition of or relief from taxation. The series of closely related steps in such a plan are merely the means by which to carry out the plan and will not be separated." p. 658 [Citations omitted]

Title 26, United States Code, Section 1031 is vague and highly debatable as indicated by the foregoing analysis and the Petitioner lacked the specific intent and this case should be reversed.[8]

The Court of Appeals for the Ninth Circuit stated that:

> "We are not persuaded by appellant's claim that, in light of the confusing state of § 1031 law, his failure to report income could not have been willful. There is no uncertainty about the tax effect of the transactions as described by prosecution witnesses; if the jury accepted

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[8] See: *Alderson v. C.I.R.*, 317 F.2d 790 (9th cir. 1963); *Biggs v. C.I.R.*, 632 F.2d 1171 (5th Cir. 1980); *Carlson v. United States*, 385 F.2d 238 (5th Cir. 1967); *Coastal Terminals, Inc. v. United States*, 320 F.2d 333 (4th cir. 1963). Those cases clearly show that the law as to Section 1031 is vague and highly debatable. It is of interest of note that these are all civil cases and an analogous Section 1031 case which resulted in a criminal conviction has not been found.

> the prosecution's version of the transactions, any complexity in the law of exchange is irrelevant. . . ." p. 3.[9]

It is respectfully suggested that the Court of Appeals for the Ninth Circuit failed to address this issue presented and that this case presents a factual and legal determination which is in conflict with the opinion of this Court and decisions by other Circuit Courts of Appeal. Due process requires that this issue be resolved in favor of the Petitioner.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

JOHN A. MITCHELL

Attorney for Roy G. Andersen

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[9] Memorandum Opinion, page 3.

Appendix

APPENDICES

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEC 4 1981

CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROY G. ANDERSEN, Defendant-Appellant.	No. 80-1686 D.C. No. No. CR 80-243 **MEMORANDUM**

RECEIVED DEC 7 1981

Appeal from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., U.S. District Judge, Presiding
Argued and Submitted September 10, 1981

Before: FLETCHER and NORRIS, Circuit Judges; and EAST,* District Judge

Andersen appeals from his conviction, after trial by jury, of willfully making false declarations on his federal income tax returns for the years 1973 and 1974 and on a partnership tax return for the fiscal year ending February 28, 1974, all in violation of 26 U.S.C. § 7206(1). We affirm.

Appellant raises four issues: (1) whether his statutory and constitutional rights to a speedy trial were violated; (2) whether the verdict is supported by substantial evidence; (3) whether the trial court erred in making certain evidentiary rulings; and (4) whether the trial court failed to instruct the jury properly.

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* The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

SPEEDY TRIAL

Appellant was indicted on April 10, 1980 and arraigned on April 24, 1980. Trial was set for June 24, 1980, but, on the prosecution's motion, was delayed until August 12, 1980. Appellant contends that the Speedy Trial Act, 18 U.S.C. § 3163 (a)(2), mandates dismissal of his indictment because the period between arraignment and trial exceeded the seventy-day limit of 18 U.S.C. § 3161(c). The mandatory sanctions of § 3162, however, apply to informations or indictments filed after July 1, 1980. 18 U.S.C. § 3163(c). Dismissal in this case, where the indictment was filed in April, 1980, was discretionary. *See United States v. West*, 607 F.2d 300, 305, n.5 (9th Cir. 1979); *United States v. Carpenter*, 542 F.2d 1132, 1134 (9th Cir. 1976). We find no abuse of discretion by the trial court in denying appellant's motion to dismiss.

Appellant further contends that the delay violated his constitutional right to a speedy trial. We disagree. Appellant did assert vigorously his speedy trial rights; however, the delay was not excessive (109 days), and appellant has demonstrated no resulting prejudice. *Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. Martin*, 587 F.2d 31, 33 (9th Cir. 1978), *cert. denied*, 440 U.S. 910 (1979). Economic loss not attributable to pre-trial incarceration is not within the interests protected by the speedy trial right. *See Barker v. Wingo*, 407 U.S. at 532.

Appellant also claims improper pre-indictment delay. Such delay is immaterial to his speedy trial claim, *United States v. Marion*, 404 U.S. 307, 320-22 (1971), and appellant has shown no actual prejudice to his fair trial rights. *See id*; *United States v. West*, 607 F.2d at 304; *United States v. Mays*, 549 F.2d 670, 677 (9th cir. 1977).

SUFFICIENCY OF THE EVIDENCE

Appellant contends there is no evidence from which the jury could have found the requisite specific intent to make false declarations. Viewing the evidence in the light most favorable to the government, we

find substantial evidence to support the jury's verdict. *See Glasser v. United States*, 315 U.S. 60, 80 (1942). On the record, the jury could reasonably have concluded that the alleged, undocumented partnership with Sapp did not exist, that appellant had never contemplated exchange transactions, and that appellant's failure to report sale proceeds was willful.

We are not persuaded by appellant's claim that, in light of the confusing state of § 1031 law, his failure to report income could not have been willful. There is no uncertainty about the tax effect of the transactions as described by prosecution witnesses; if the jury accepted the prosecution's version of the transactions, any complexity in the law of exchanges is irrelevant.

Appellant also challenges the government's failure to present an expert witness. As he concedes, no rule of law requires introduction of expert testimony;[1] the claim is one of sufficiency of the evidence, *see United States v. Ingham*, 426 F.2d 973, 976 (9th cir. 1970), and fails for the reasons stated above.

EVIDENTIARY RULINGS

Appellant contends that the trial court improperly excluded relevant evidence on both direct and cross-examination. The trial court has wide discretion in supervising the examination of witnesses, *United States v. Brown*, 456 F.2d 293, 295 (2d Cir. 1972), *cert. denied*, 407 U.S. 910 (1972),find no abuse of discretion. The excluded information concerning the complexity of § 1031 law and the nature of tax relief statutes was of doubtful relevance and was admitted in other forms.

Appellant further contends that the trial court erred in refusing offers of proof of the relevance of cross examination of Guy Luttrell. An offer of proof serves to make a record for appellate review, and is unnecessary where the record shows the substance and purpose of the proffered evdience. *Frisone v. United States*, 270 F.2d 401, 402-403 (9th Cir. 1959).

It is clear from the record that the excluded evidence, which concerned Luttrell's business dealings and personal tax affairs, was offered as an attack on Luttrell's credibility. The trial court did not err in refusing counsel's offer of proof.[2]

Nor did the trial court err in excluding the evidence. The defense cross-examined Luttrell extensively, and the jury had sufficient information on which to assess his credibility as a witness. *See United States v. Blecker*, 601 F.2d 382, 383 (9th Cir. 1979); *United States v. Salsedo*, 607 f.2d 318 (9th Cir. 1977).

JURY INSTRUCTIONS

Finally, appellant contends that the trial court erred in rejecting appellant's proposed jury instructions, and in failing to give, *sua sponte*, additional instructions. The trial court's instructions fairly reflected the substance of appellant's proposed charge, *see United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978), and we find no error in the charge as a whole. *See United States v. Park*, 421 U.S. 658 (1975).

Failure to instruct *sua sponte* is error only where the omission results in fundamental prejudice to the defendant. *See Bernal v. United States*, 352 F.2d 284, 285 (9th Cir. 1965). Appellant has neither specified the content of instructions that should have been given, nor shown how he was prejudiced by their omission.

The judgment of the district court is AFFIRMED.

FOOTNOTES

1. Appellant does not argue that a lay witness introduced evidence that by its nature required an expert witness. *Cf. Frisone v. United States*, 270 F.2d 401, 403 (9th Cir. 1959).

2. It is unclear, moreover, that counsel was precluded from making an offer of proof at a later time, outside the jury's presence.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROY G. ANDERSEN, Defendant-Appellant.	No. 80-1686 D.C. No. CR 80-243 **ORDER**

Before: FLETCHER and NORRIS, Circuit Judges; and EAST*, District Judge.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for reharing [*sic*] is DENIED and the suggestion for a rehearing en banc is REJECTED.